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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN UTILITIES, INC., a Wyoming corporation,
Petitioner,

v.

KERR-McGEE CORPORATION, a Delaware corporation,
Respondent.

NORTHERN UTILITIES, INC., a Wyoming corporation,
Petitioner,

v.

AMOCO PRODUCTION COMPANY, a Delaware corporation and PHILLIPS PETROLEUM COMPANY, a Delaware corporation,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. In holding that a price escalator clause in a contract for the sale of natural gas is not unconscionable, whether the court of appeals erred in neglecting to consider the following six facts:

   (1) The language of the clause was entirely drafted by the producer and is "unique"; it was purposefully crafted to be "definitely indefinite".

   (2) The producer intended that the clause should adopt a nominally higher "price" by reference to a third party sale without proper adjustment for differences in measurement factors.

   (3) The producer intended the clause to serve as a mechanism to charge for more heat content that the gas contains.

   (4) The producer intended by use of the clause to collect from the purchaser, as reimbursement for taxes, substantial sums of money in excess of the taxes paid.

   (5) The lever employed by the producer to secure the clause misled the purchaser to believe that the clause merely provided for a small premium over the price at which the gas could be sold in interstate commerce.

   (6) The resale of 40% of the gas back to the producer is transformed into an operating loss through application of the clause.

2. Whether the court of appeals erred in holding that the price escalator clause in this case is not contrary to public policy.

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PETITION FOR CERTIORARI

OPINIONS BELOW

United States Court of Appeals for the Tenth Circuit: *Kerr-McGee Corporation* v. *Northern Utilities, Inc.*, 673 F.2d 323 (10th Cir. 1982)

United States District Court for the District of Wyoming: *Kerr-McGee Corporation* v. *Northern Utilities, Inc.*, 500 F. Supp. 624 (D. Wyo. 1980)

JURISDICTIONAL STATEMENT

Review is sought of a decision of the United States Court of Appeals for the Tenth Circuit dated and entered on March 23, 1982. Order denying petition for rehearing dated June 14, 1982 and entered June 15, 1982.

Jurisdiction of this Court to review that decision by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

PERTINENT STATUTES

Section 34-21-219 of the Wyoming Statutes (1977). *Unconscionable Contract or Clause:*

> "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> "(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

Section 34-21-103 of the Wyoming Statutes (1977). *Supplementary General Principles of Law Applicable.*

> "Unless displaced by the particular provisions of this act [§§ 34-21-101 to 34-21-1002], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." (Laws 1961, ch. 219, § 1-103.)

Section 105 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3315. *Ceiling Price For Sales Under Existing Intrastate Contracts.*

> "(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any suc-

cessor to an existing contract, which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act.

"(b) MAXIMUM LAWFUL PRICE.—

"(1) GENERAL RULES.—Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—

"(A) the price under the terms of the existing contract, to which such natural gas was subject on the date of the enactment of this Act, as such contract was in effect on such date; or

"(B) the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas).

"(2) CONTRACT PRICE EXCEEDING NEW GAS CEILING PRICE ON ENACTMENT.—In the case of any natural gas described in subsection (a) for which the contract price applicable on the date of the enactment of this Act exceeds the maximum lawful price, per million Btu's, computed for such date under section 102 (relating to new natural gas), the maximum lawful price under this section shall be the higher of—

"(A) the maximum lawful price, per million Btu's, computed for such month under section 102; or

"(B)(i) the contract price on the date of the enactment of this Act, in the case of the month in which this Act is enacted; and

"(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

"(3) PRICE INCREASES RESULTING FROM INDEFINITE PRICE ESCALATOR CLAUSES.—

"(A) IN GENERAL—Effective January 1985, and each month thereafter, in the case of any first sale of natural gas, which is sold at a price established under any indefinite price escalator clause of any existing contract or successor to an existing contract and for which the contract price on December 31, 1984, is

higher than $1.00 per million Btu's, the maximum lawful price under this section for any such natural gas delivered during any month shall be the higher of—

"(i) the maximum lawful price, per million Btu's, computed under paragraph (2)(B); or

"(ii)(I) in the case of January 1985, the maximum lawful price, per million Btu's, computed under section 102 (relating to new natural gas) for such month; and

"(II) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this clause for the immediately preceding month multiplied by the monthly equivalent of the sum of a factor equal to the annual inflation adjustment factor applicable for such month plus .03.

"(B) DEFINITION OF INDEFINITE PRICE ESCALATOR CLAUSE.—For purposes of this paragraph, the term 'indefinite price escalator clause' includes any provision of any contract—

"(i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products; or

"(ii) which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

"(C) CONTRACT MODIFICATIONS AFTER MAY 3, 1978, TO BE DISREGARDED.—In the case of any natural gas which was subject to any contract on May 3, 1978, that contained an indefinite price escalator clause on such date, no amendment to or modification of the operation of such contract made after such date may have the effect of limiting or precluding the application of this paragraph on or after January 1, 1985, to prices allowed with respect to such natural gas.

"(D) EXCLUSION—Subparagraph (A) shall not apply to any first sale of new natural gas (as defined in section 102(c)), stripper well natural gas (as defined in

section 108(b)), high-cost natural gas (as defined in section 107(c)), natural gas produced from a new, onshore production well (as defined in section 103(c)) from a completion location located at a depth of more than 5,000 feet, and, beginning July 1, 1987, or, if later, the date of expiration of any price controls reimposed under section 122, natural gas produced from any new, onshore production well (as defined in section 103(c)) from a completion location located at a depth of 5,000 feet or less.

"(c) DEFINITION OF CONTRACT PRICE.—For purposes of this section, the term 'contract price,' when used with respect to any specific date, means—

"(1) the price paid, per million Btu's, under a contract for deliveries of natural gas occurring on such date; or

"(2) if no deliveries of natural gas occurred under such contract on such date, the price, per million Btu's, that would have been paid had such deliveries occurred on such date."

STATEMENT OF THE CASE

This is a petition to the United States Supreme Court for a Writ of Certiorari. Review is sought of a decision of the United States Court of Appeals for the Tenth Circuit which reversed a judgment entered by the United States District Court for the District of Wyoming. Jurisdiction of the district court was based on the diversity of citizenship among the parties and the requisite amount in controversy. 28 U.S.C. § 1332.

These consolidated cases concern the enforcement of an indefinite price escalator clause in three contracts for the intrastate sale of natural gas in Wyoming. The clause is designated Article 6(b) in all three contracts and is identical in each case. Petitioner, Northern Utilities, Inc. (hereafter "Northern"), is the purchaser of the gas under each contract. Respondents are the producers and the sellers of the gas under separate contracts; they are Amoco Production Company (hereafter "Amoco"), Kerr-McGee Corporation (hereafter "Kerr-McGee") and Phillips Petroleum Company (hereafter "Phil-

lips"). The central question presented is whether Article 6(b) is unconscionable under Section 2-302 of the Uniform Commercial Code as adopted in Wyoming or whether it is otherwise unenforceable as being against federal and state public policy.

On January 19, 1978, Kerr-McGee filed an action against Northern in the United States District Court for the District of Wyoming seeking to recover amounts allegedly owed by Northern but not paid and also seeking a declaratory order to establish the prospective application of Article 6(b). Northern answered, *inter alia*, that Article 6(b) was unenforceable, and filed actions in the same court asserting like claims against Amoco and Phillips. The three actions were consolidated.

On October 23, 1980, following a non-jury trial, the district court held that Article 6(b) was void and unenforceable on the grounds that it was contrary to public policy and unconscionable under Section 2-302 of the Uniform Commercial Code, Wyo. Stat. § 34-21-219 (1977). The Court excised Article 6(b) and ordered that the remainder of the contracts should be enforced. (Appendix A-4; hereafter findings and conclusions of the district court are cited by number). Under a supplemental judgment entered on November 20, 1980, the district court ordered the producers to repay Northern the sum of $67,758,567.43 plus interest. (Appendix A-5). Execution of the judgment was stayed pending appeal. The pleadings filed by Northern stated that any amounts repaid by the producers would in turn be refunded to customers of Northern.

The United States Court of Appeals for the Tenth Circuit entered a decision on March 23, 1982 which held that Article 6(b) is enforceable and that the clause is neither unconscionable nor contrary to federal or state public policy. (Appendix A-1).

The contracts in this case provide for the sale of natural gas produced from the Beaver Creek field in central Wyoming. All of the Beaver Creek gas production is purchased by Northern, forming about 85% of its total gas supply. (Findings 10 and 11). About 40% is resold to Amoco and its refinery affiliate, the balance being sold by Northern to domestic household and small commercial establishments under utility tariffs.

Only Amoco and Northern conducted face to face negotiations. Agreements entered into between them were copied or adopted by reference in later contracts between Northern on the one hand and Kerr-McGee and Phillips on the other. Subsequent discussion will refer only to the contract between Amoco and Northern unless otherwise noted.

All earlier agreements were superseded by the Gas Sales Contract entered into on November 20, 1957 (hereafter the "1957 Contract").[1] It provided for the sale of Beaver Creek gas over a twenty-year period. Northern was obligated to take, or pay for in any event, certain minimum annual quantities (hereafter the "take-or-pay" obligation). The 1957 Contract contained three price provisions. Article 5 set forth a fixed price schedule which escalated annually from 10.17¢ per thousand cubic feet ("Mcf") in 1959 to 20.81¢ per Mcf in 1978. Article 7 provided for an adjustment to that fixed price based upon inflation. Article 6, Favored Nations Clause, escalated the price payable under the 1957 Contract to equal the highest price paid by Northern to any other producer of gas in the State of Wyoming. In addition to the above price provisions, Article 16 provided for Northern to reimburse certain production related taxes. Another article of the 1957 Contract prohibited Northern from reselling Beaver Creek gas in interstate commerce. At the same time as the 1957 Contract was being negotiated, collateral agreements were entered into for the resale of a part of the Beaver Creek gas back to Amoco and to its refinery affiliate; the resale price was agreed to be a fixed margin per Mcf above the price paid by Northern for Beaver Creek gas. Kerr-McGee and Phillips were not parties to those collateral resale agreements.

On April 7, 1970, Amoco notified Northern that Beaver Creek gas reserves had been recalculated to exceed the quantities committed under the 1957 Contract. Amoco expressed its

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[1] Exhibit A-1; the Kerr-McGee contract is dated October 14, 1958, Exhibit B-1; and the Phillips contract is dated May 20, 1958, Exhibit C-1.

desire to sell the excess gas coextensively and invited Northern to negotiate for the purchase of that additional gas. (Exhibit A-6). A major renegotiation ensued which culminated in the execution of a number of separate instruments. Among these was a supplemental agreement dated October 1, 1970 (hereafter the "1970 Supplement").[4] It amends the 1957 Contract in a number of respects. (Finding 20). Except for the term extension, each represented a concession by Northern. The term of the contract was extended twelve years and two months to December 31, 1990. The annual take-or-pay obligation was increased from a ratio of 59% of the peak deliverability capacity of the Beaver Creek Field to a ratio of 92.7% of that capacity. The producers' delivery pressure obligation was reduced. Article 16 was amended to increase Northern's obligation to reimburse production related taxes. The fixed price schedule in Article 5 was amended to provide for prices during the extended term ranging from 21.81¢ per Mcf in 1979 to 29.8¢ per Mcf in 1990, representing slightly higher annual increases than had been the case under the 1957 Contract, all subject to adjustment for inflation. The 1970 Supplement further redesignated Article 6 to be paragraph (a) and adopted the price escalator clause here at issue as Article 6(b). That clause links the price to be paid under the contract to the price being paid for gas sold in interstate commerce. (Reprinted in Appendix A-7).

In addition to the 1970 Supplement, a number of collateral agreements were reached at the same time. They too were concessions by Northern. One provided for Northern to finance compression equipment for compressing Beaver Creek gas. (Exhibit A-9). The remaining collateral agreements principally concerned arrangements under which Northern sells gas to Amoco and its refinery affiliate. The fixed resale margins were retained. (Exhibits A-8, 10, 12 and 13).

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[4] Exhibit A-7; the Kerr-McGee supplement is dated February 23, 1973, Exhibit B-8; the Phillips supplement is dated May 4, 1973, Exhibit C-12.

Article 6(b) engendered no discussion between the parties from the time of its adoption in 1970 until a month before its effective date of January 1, 1976. (Tr. 295). Meanwhile, however, the Federal Power Commission had materially changed the manner in which it regulated the price of gas produced in Wyoming and sold in interstate commerce. While there had been but a single price for interstate gas in 1970, there were many categories of prices in 1976. The principal distinguishing feature among price categories was the year in which the gas was discovered, generally referred to as the "vintage" of the gas. Other criteria also affected the applicable price under Federal Power Commission regulations. For example, those persons who qualified as "small producers" were authorized to collect 130% of the otherwise applicable price. Also during this period, the Federal Power Commission changed its pricing unit from an Mcf basis to one based upon a million British Thermal Units. The basic thrust of the new Federal Power Commission policy was to set new gas prices markedly higher as an incentive to attract gas to the interstate market. Prices for old flowing gas were adjusted for inflation but remained relatively low. Consumers buying interstate gas were not adversely affected because the effect of the higher priced gas could be averaged or "rolled-in" with the much greater volume of old gas. (Tr. 549). With Beaver Creek accounting for 85% of Northern's supply, no cushion existed.

An important development occurred after this litigation was begun when the Natural Gas Policy Act of 1978 was enacted. 15 U.S.C. § 3301 *et seq.* ("NGPA"). Beginning December 1, 1978, Section 105 of the NGPA has imposed a maximum lawful price ceiling on Beaver Creek gas. That ceiling is the lesser of the price under the terms of the contract or the maximum lawful price determined monthly for "new" gas under Section 102 of the NGPA.

The producers elected to call no witnesses at trial and Northern called four. The principal two are:

1. *Arles H. Barrett.* Mr. Barrett has been employed by Amoco since 1946. His duties involved natural gas measurement until 1963 at which time he assumed duties

in contract negotiation. He was the individual through whom Amoco negotiated in 1970 with Northern. (Tr. 53 and 54).

2. *Edwin V. Magagna.* Mr. Magagna had been employed by Northern part-time since 1963 and full-time since 1971. He is an attorney and is the individual through whom Northern negotiated in 1970 with Amoco. (Tr. 260 and 347).

ARGUMENT

1. SUMMARY.

The court of appeals below wholly ignored the entire body of evidence in this case which the unconscionability statute declares to be relevant: evidence of the commercial setting, the purpose and the effect of the particular bargain at issue. The clause in this case is unique. Unconscionability is intrinsic to its design, purpose and result. By stating a price in dimensionless terms, it adopts by reference a third party's dollar and cents price which on its face is higher, but which in fact is not. The producers intended the clause to utilize no conversion factor to adjust for differing measurement base, differing heat content (Btu), differing tax assessments, and as emphatically as all, the producers here, among the largest in the United States, ask to be paid new gas prices for old gas plus the small producer bonus.

The clause was adopted in 1970 when the producers reopened an existing contract in order to foreclose Northern from buying cheaper gas which was then available. Amoco and the other producers secured a long list of one-sided concessions from Northern whose only benefit was an extension of the term, and even that was mutually beneficial. The lever to reopen the contract was Amoco's threat to sell freshly recognized Beaver Creek reserves to an interstate purchaser coextensively with continuing sales to Northern under the existing contract, a circumstance which would have placed Northern's principal gas supply in jeopardy. Article 6(b) was peripheral to the central concessions. The threat of a coextensive interstate sale misled Northern to accept that the clause

was intended only to insure that the price under its contract should always be 3¢ above the price at which Beaver Creek gas could have been sold in interstate commerce at that time.

Application of the clause has resulted in the resale of 40% of the gas back to Amoco and its refinery affiliate to be a service rendered by Northern at a loss. The remaining gas is sold by Northern to residential and small commercial consumers who have stood aghast as the Beaver Creek price spiraled upward by ten-fold over a four year period and their gas bills increased accordingly. The public interest in this case speaks correspondingly loud. The unconscionability of this clause should be redressed. Certiorari should issue.

II. UNCONSCIONABILITY.

The court of appeals below chose to view the record as one presenting the simple case of a rising market price which neither party could foresee at the time of the adoption of Article 6(b), a clause which the court reasoned was knowingly accepted by Northern as the *quid pro quo* for assuring a long term gas supply. Such is not the case. Unconscionability arises from the facts of record, facts which the court of appeals overlooked and did not consider. In doing so, the court of appeals has so far departed from the accepted and usual course of review as to call for an exercise of this Court's power of supervision.

Unconscionability is a common law concept akin to equity which dates from at least 1663. Now codified in Wyoming, which adopted the Uniform Commercial Code provision without modification, the beginning point of inquiry must be the language of the statute itself. Section 2-302 of the Uniform Commercial Code, Wyo. Stat. § 34-21-219 (1977).

Evidence describing the "commercial setting" in which the contractual provision was adopted, evidence disclosing the "purpose" which the parties intended the provision to fulfill and evidence adducing the "effect" which the provision has had are the three elements which the statute itself declares are designed "to aid the court in making the determination. The

statute, therefore, can be seen to describe unconscionability as a legal result which flows from the particular commercial setting, purpose and effect of a contractual provision. Unconscionability flows from the facts.

1. The Language Of Article 6(b) Was Entirely Drafted By Amoco And Is "Unique"; It Was Purposefully Crafted To Be "Definitely Indefinite".

Mr. Barrett conceived the substance of the clause and Amoco's legal staff drafted the language under his direction. (Tr. 160). Mr. Barrett testified that Northern's representative had no input at all into the language of the clause. (Tr. 228). The resulting language was unique. It is like no other favored nations clause in Wyoming. Mr. Barrett so testified: "It is unique to this contract. It is unique to contracts as a whole in Wyoming." (Tr. 161). He explained what makes it unique:

> A. Because it is definitely indefinite as to price. It is the highest price paid. Very often third party favored nations provisions do have some limitations.

(Tr. 231).

Article 6(b) was framed in language so indefinite that the resulting price has no reasonable limit. Amoco intended that there should be no reasonable limit, and Kerr-McGee and Phillips have adopted that meaning as their own.

2. Amoco Intended That Article 6(b) Should Adopt A Nominally Higher "Price" By Reference To A Third Party Sale Without Proper Adjustment For Differences In Measurement Factors.

It is self-evident that a price denominated in dollars per gallon must be adjusted before comparing it to one denominated in dollars per quart. A conversion must be made. The nominal price per gallon must be divided by 4 to properly reflect the price per quart. In adopting a third party's price by reference, Amoco intended that Article 6(b) should be subject to no such conversion.

Natural gas is measured on a volumetric basis in units of one thousand cubic feet, an Mcf. As a compressible fluid, however, the amount of gas contained in an Mcf is directly proportionate to pressure. The higher the pressure, the more gas there is in an Mcf. (Tr. 552). No single pressure base has ever become universally accepted as standard in the natural gas industry. Article 12 of the Beaver Creek contract specifies that gas is to be measured at a pressure base of 15.025 psia. Federal regulations employ different pressure bases. (Tr. 542 and 552).

Frank H. Houck was a member of the legal department of Amoco who took part in drafting the language of Article 6(b). (Tr. 163). His meaning of the clause is memorialized in an internal Amoco memorandum addressed to Mr. Barrett's immediate superior: "pressure base adjustments are not material. If a producer receives, say, 72¢ per MCF (regardless of pressure base), Amoco is entitled to collect 75¢ per MCF (regardless of pressure base)." (Exhibit I-30, parenthetical remarks in original.) In his testimony, Mr. Barrett made clear that he concurred with Mr. Houck that no pressure base factor should be used.

> Q. And you don't compare the price pressure base and compare it to Beaver Creek pressure base?
>
> A. That is not what Article 6(b) provides.
>
> Q. Well, is that what you have been doing?
>
> A. Oh . . . . Amoco is really accepting a lesser price than it is entitled to receive under Article 6(b).

(Tr. 189).

A "price" clause which specifies no unit of measurement is a license to steal. It is manifestly unconscionable.

3. Amoco Intended Article 6(b) To Serve As A Mechanism To Charge For More Btu's Than Beaver Creek Gas Contains.

The heating value of natural gas is measured in British Thermal Units ("Btu's"). Experienced in gas measurement, Mr. Barrett was able to define a British Thermal Unit at trial

from his own knowledge without reference to any text: "Btu is the amount of heat energy necessary to raise one pound of water one degree from 58.5 to 59.5 degrees Fahrenheit." (Tr. 55). He recognized that high Btu gas is priced higher in the market place than is low Btu gas. (Tr. 56). He testified that "Beaver Creek gas is processed" to remove "propane, butane and gasoline", a fact which reduces the Btu content of the naturally occurring gas. (Tr. 218). Mr. Barrett was emphatic, however, that Article 6(b) was intended to escalate the Beaver Creek price to the high price level received by a seller of rich Btu gas. He would "diligently search" for the highest Btu gas sold in interstate commerce because "I would like the contract implemented to the fullest." (Tr. 219). Mr. Barrett testified that no Btu adjustment was intended to be made by Article 6(b) before applying the third party's "price" for gas having a higher Btu value than Beaver Creek gas.

Q. And then do you compare his Btu to Beaver Creek Btu and make an adjustment for that?

A. Absolutely not. (Tr. 198 and 199).

A letter agreement entered into between Amoco and Northern on June 25, 1976, just six months after Article 6(b) became effective, sets forth the technical details necessary for measuring the Btu value of Beaver Creek gas. A recital describes the purpose of this measurement: "Currently it is necessary to determine the gross heat content of the gas delivered under the contract to compute the price for such gas." (Exhibit I-26). Mr. Barrett, however, categorically denied that the necessity for measuring the Btu of Beaver Creek gas at that time had anything to do with Article 6(b). (Tr. 84 through 91).

All persons except Mr. Barrett seem to have misinterpreted the letter agreement. Amoco, Kerr-McGee and Phillips withdrew their original Exhibits 11, 12 and 13. With leave of court, they filed substituted exhibits after the trial. The original exhibits were based on the actual Btu's contained in Beaver Creek gas. (Tr. 247). The substituted exhibits reflect the higher Btu's contained in various third parties' gas sold in interstate commerce. For the period January 1, 1976 through

November 30, 1978, this additional Btu claim alone amounts to more than $4.2 million. (Substituted Exhibits 11, 12 and 13).

In reaching out to be paid for more Btu's than are delivered, Article 6(b) has reached too far. It has reached unconscionable proportions. Purveyors of gasoline may not in conscience charge for high-octane ethyl when they only deliver regular.

4. Amoco Intended Article 6(b) To Reach Out For The Reimbursement Of More Production Taxes Than Are Paid On Beaver Creek Gas.

Relying on Article 6(b), the producers ask to be reimbursed for more production taxes than are actually paid by them on Beaver Creek gas. Article 16 of the 1957 Contract obligates Northern to reimburse a part of the production tax paid on Beaver Creek gas. According to Mr. Barrett, Article 6(b) supersedes that provision and requires Northern to pay Amoco an amount per Mcf equal to the tax reimbursement received by a producer for gas sold in interstate commerce. But no two producers in the State of Wyoming pay the same tax. Severance and conservation taxes depend on the amount of exempt government royalty. (Tr. 250 and 481). Ad valorem taxes are assessed by local government units and consequently vary from one county to another, and within a county, from one school district to another. (Tr. 251 and 252). Mr. Barrett testified that tax reimbursement under Article 6(b) should be treated in the same manner as pressure base and Btu. (Tr. 217 through 219). A "diligent search" should be made to identify the highest taxed school district and the producer with the least government exempt royalty because "I would like the contract implemented to the fullest." (Tr. 219). The producers' original Exhibits 11, 12 and 13 asked to be reimbursed only the taxes actually paid on Beaver Creek gas. (Tr. 251). Conforming their exhibits to the testimony of Mr. Barrett, the producers Substituted Exhibits 11, 12 and 13 ask to be paid more than three-quarters of a million dollars simply because various higher taxed producers were identified.

5. The Lever Employed By Amoco To Reopen The 1957 Contract Misled Northern To Believe That Article 6(b) Merely Provided For A Nominal 3¢ Premium Over The Price At Which Beaver Creek Gas Could Be Sold In Interstate Commerce.

It became apparent to Amoco in early 1970 that other gas supplies were becoming available and that Northern "is able to obtain gas under such commitments at prices less than our Beaver Creek price (15¢ Mcf vs. 17.4¢ Mcf)." (Exhibit I-6). Amoco determined to foreclose Northern from contracting for those supplies.

If the Beaver Creek take-or-pay obligation could be raised sufficiently high, Northern would have no capacity left to purchase gas from others. The annual take-or-pay obligation is directly proportional to the peak daily deliverability under Exhibit B to the contract. Amoco initially focused on improving deliverability. In January of 1970, Amoco related to the other two producers by letter that such steps should be taken.

> "We feel that new gas supply sources will be available to NUI over the next four years. Such an atmosphere warrants that every effort be dedicated toward meeting the deliverability requirements of the Contract to sustain the current minimum obligation. (Exhibit I-4).

But sustaining the take-or-pay obligation by maintaining deliverability is expensive. The expense could be avoided if Northern could be persuaded to make the necessary concessions. It could. Northern amended the contract to reduce the delivery pressure requirement (Exhibit A-7, Paragraph 6), financed $1.2 million worth of compression equipment (Exhibit A-9) and increased the take-or-pay obligation from a ratio of 59% of the peak deliverability capacity to a ratio of 92.7% of that capacity (Exhibit A-7, Paragraph 3; Tr. 266).

The lever to reopen the contract was found in Article 8(d). It permitted coextensive sales of Beaver Creek gas to third parties. All that was needed was a sufficiently high gas reserve estimate. Amoco commiasioned an in-house study which reached the desired conclusion. (Exhibit I-5). "Armed with your recent reserve study" Mr. Barrett wrote in an internal

Amoco memorandum, "we commenced to negotiate." (Exhibit I-6). The author of that reserve study wrote that Mr. Barrett would also "attempt to use the Beaver Creek situation as a lever to obtain concessions which would help us in other fields," those fields principally being the points where Northern resells gas back to Amoco. (Exhibit I-7). The lever was applied in a letter inviting Northern to negotiate for the purchase of the freshly recalculated reserves. (Exhibit A-6). Mr. Magagna was told that Amoco was prepared to coextensively sell Beaver Creek gas to an interstate purchaser. He testified:

> "When we were negotiating in 1970 we were talking about whether they were selling gas to us in 1970 or to somebody else in 1970. Now as far as we knew the only purchasers available to buy it in 1970 was interstate purchasers." (Tr. 403).

Mr. Barrett testified, however, that Amoco in fact had no such intention.

> Q. . . . . Did you compare the prospective NU deal with another deal to a buyer who would be an interstate purchaser?
>
> A. I did not . . . . [M]y intent was to sell the gas to Northern.

(Tr. 141).

An internal Amoco document prepared in 1970 expresses the company's reservations respecting its right to sell Beaver Creek gas coextensively. (Exhibit I-19). Another internal Amoco document prepared in 1970 declares that the reserve study was simply the prerequisite necessary to present Northern with a shopping list of concessions. "Such additional reserves opened the door to amend the Beaver Creek Gas Sales Contract, and the presence of interstate gas purchasers in the area give weight to the concessions." (Exhibit I-21).

Although Amoco never seriously considered coextensively selling Beaver Creek gas to an interstate pipeline, that possibility opened the door to amend the contract and gave weight to the concessions it sought. It is that lever which misled Northern into believing that Article 6(b) was meant to provide

a 3¢ premium over what Amoco would have received if it had coextensively sold the gas to an interstate pipeline. Mr. Magagna testified that in discussing Article 6(b) in 1970, he and Mr. Barrett "were trying to come up with an answer . . . [to] what we were going to pay in order to have it sold to us, in lieu of being sold to somebody else." (Tr. 420). The following excerpt reflects the understanding of Mr. Magagna respecting negotiation of Article 6(b).

> A. Well, the best that I can recall that it come up that intrastate gas was being sold at a premium. And at this point that they had this gas to sell, and that they wanted to be sure that they were getting a premium over what they could get for this gas, were they to sell it in interstate commerce under the regulations, and they wanted to be sure that whatever the regulated price would be that they would be entitled to get, had they sold that, that they wouldn't wind up and say, "Well, you made a mistake, you should have sold this gas in interstate commerce because you have a better deal."
>
> Q. And then when you saw what became the forerunner of the present 6(b), was there more discussion about what that would do or whether that would accomplish what you had discussed?
>
> Tell us what the discussion was.
>
> A. No, other than it made the discussion about the amount. After it got written with the 3 cents in, I don't think that we had much to discuss about it. We didn't discuss it further.

(Tr. 286 and 287).

Every detail of the origination of Article 6(b) was examined at trial; a disproportionate share of argument is devoted to that subject. The inference may be created that this clause was central to the 1970 contract netotiations. It would be a false inference. Although some issues were "kicked back and forth" (Tr. 280) and the negotiators "hemmed and hawed around" on others (Tr. 279), Article 6(b) was a peripheral concession to which little time or though was given.

Amoco included no such clause in its initial draft of the supplemental agreement. (Exhibit I-8). No such clause was proposed to Northern until the "third or fourth" meeting between the parties. (Tr. 276). Internal economic evaluations of the supplemental agreement made by Amoco were based entirely on the inflation adjusted fixed price schedule. (Exhibit I-11; Tr. 167). More negotiating time was devoted to the compression financing arrangements than to any other issue. (Tr. 273). So far as Article 6(b) itself was concerned, its effective date was discussed (Tr. 285) and two counties were excluded from its reach. (Tr. 293). Messrs. Barrett and Magagna both testified, however, that the only substantive discussion about the clause concerned the amount of the premium; it was quickly reduced from the initially proposed 5¢ to 3¢ and they turned their attention to other matters. (Tr. 229 and 277).

After all negotiations with Northern were completed, Amoco worked the supplemental agreement through its management committee system for approval and execution. When it reached the general office for final approval, a written presentation was prepared. (Tr. 178). It discusses a number of Northern's concessions, but "basically" the supplemental agreement is characterized as being "a decrease in the peak deliverability . . . in exchange for an extended term." (Exhibit I-19). Respecting price, the fixed price schedule of Article 5 is set forth in detail and the inflation adjustment under Article 7 is noted. But nowhere does that written presentation make reference to Article 6(b).

Northern had a presentation to make as well. A seven page statement was made when the various agreements were filed with the Wyoming Public Service Commission. Eight separate instruments were submitted for filing and each was summarized. The supplemental agreement containing Article 6(b) was described in these words:

> "This extends term to 12-31-1990, provides base price for years 1979 to 1990 inclusive, amends delivery rates, re-

duces delivery pressure, and provides for reimbursement for all additional taxes." (Exhibit A-15).

Like the general office of Amoco, Northern, too, so misapprehended the reach intended by Mr. Barrett for Article 6(b) that the clause was not mentioned in its presentation.

6. The Resale Of 40% Of Beaver Creek Gas Back To Amoco Is Transformed Into An Operating Loss For Northern By Operation Of Article 6(b).

Northern is obligated to resell about 40% of Beaver Creek gas back to Amoco and its refinery affiliate, with the refinery accounting for the preponderance of that quantity. (Tr. 233). Northern purchases the gas at Beaver Creek; transports it a hundred miles or more and resells the gas back to Amoco at a fixed margin above the Beaver Creek price, 5 cents per Mcf in the case of the refinery. (Tr. 210). One expense of transportation, termed a "line loss", represents the fact that less gas is delivered from a long transmission pipeline than is received. Northern experiences an average line loss equal to 2% of the volume handled. (Tr. 317). The expense varies directly with price, and at the Article 6(b) price at the time of trial, $2.80, the 2% line loss amounts to 5.6 cents per Mcf, more than consuming the entire 5¢ per Mcf margin. (Tr. 319). In contrast, the Article 5 price for the same period would have been just under 60 cents, after the inflation adjustment provided for in the contract. (Exhibit F). That price would have resulted in a line loss expense of less than 1.2 cents per Mcf. Northern's loss arises directly from the one-sided application of Article 6(b) to the purchase side of the transaction. A wholesaler who has required his retailer to transport and resell 40% of the goods back to him, at a loss, has struck a bargain too far unbalanced to leave stand.

* * * * * * * * * * *

Do the foregoing facts establish unconscionability? They are at least relevant considerations. Certiorari should be granted because the court of appeals completely ignored these facts.

The unconscionability provision of the Uniform Commercial Code is the law which declares these facts to be relevant. They evidence the commercial setting, the purpose and the effect of Article 6(b). But do the facts of this case rise to unconscionable proportions? The legislative history of the statute must be consulted and analogies to the common law must be drawn. "Unless displaced by the particular provisions of this act, the principles of law and equity . . . shall supplement its provisions." UCC Section 1-103, Wyo. Stat. 34-21-103 (1977).

The earliest reported unconscionability case involved assumpsit on a horse. The defendant had agreed to buy at a price equal to one barley corn per nail in the horse's shoes, doubling the amount with each nail. The horse had 32 nails in its shoes which led to a price of 500 quarters (4,000 bushels) of barley, a patently exhorbitant price of 100 pounds sterling. Chief Justice Hyde directed the jury to give the value of the horse, 8 pounds sterling, in damages. *James* v. *Morgan*, 1 Lev. 111, 83 Eng. Rep. 323 (1663). Another early English court refused to enforce an unconscionable quantity clause. In consideration of a nominal sum of money, the defendant had agreed to deliver two grains of rye on a certain Monday and to double that quantity on successive Mondays for a year. The astronomical quantity of 524,288,000 quarters of rye had been demanded at trial. *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164, 92 Eng. Rep. 270 (1705). It is noteworthy that these cases both involved the sale of goods. Both involved oppression and unfair surprise, as relates to price in the one and quantity in the other. The surprise manifests itself in that the aggrieved party would not have accepted the unconscionable provision if the outrageous sum generated by it had been expressed in direct terms instead of being obfuscated.

These two cases "were plainly cases in which one party took advantage of the other's ignorance of arithmetic to impose upon him." *Hume* v. *United States*, 132 U.S. 406, 413 (1889). Transplanting the principles developed in England, *Hume* became the leading American case on unconscionability. The facts in *Hume* involved a contract under which the plaintiff agreed to sell shucks to the government at a price of 60¢ per

pound. The government answered that the price of 60¢ was meant to be denominated in units of hundredweight. A mistake had been made in the printing. But the plaintiff testified that there was no mistake on his part; he intended to bid 60¢ per pound and that is what the contract said. Evidence was introduced in the trial to establish that the value of shucks ranged from 3/5¢ per pound to 1-3/4¢ per pound and that the custom of the government was to purchase shucks by the hundredweight. The court announced the proposition that "if a contract be unreasonable and unconsionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only what he is equitably entitled to." *Id.* at 413. The *Hume* court adopted a definition of unconscionability which has been often cited. An unconscionable bargain is one "such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other." *Id.* at 411. That is the definition of unconscionability which has been adopted in Wyoming. *In re Estate of Frederick*, 599 P.2d 550, 556 (Wyo. 1979).

When the law governing the sale of goods was codified in the Uniform Commercial Code, the common law heritage respecting unconscionability was preserved by the draftsmen. "The basic test is whether . . . the clauses involved are so one-sided as to be unconscionable . . . . The principle is one of the prevention of oppression and unfair suprise." Uniform Commercial Code, Official Comment to § 2-302, American Law Institute (1962). (Reprinted in Appendix A-6). The comments reference eleven cases in all. *Campbell Soup Co.* v. *Wenz*, 172 F.2d 80 (3rd Cir. 1948) is cited in the text. Ten others are set forth in a list.

Unfair surprise is one test suggested in the comments. The test looks for some indicia of surprise: a gasp, a skipped heartbeat or a dropped jaw perhaps. Material variations from what a contracting party was lulled into expecting produce surprise. Obviously relevant is whether the implications of the clause should have been pointed out especially, or explained, or at the very least not hidden in verbal complexity. The test might be

stated: if the clause had been understood, would it have been accepted? Through the artifice of threatening to sell Beaver Creek gas coextensively to an interstate purchaser, Amoco lulled Mr. Magagna into believing that Article 6(b) merely provided for a 3¢ premium over the price that Amoco could receive for Beaver Creek gas in an interstate sale. Would Mr. Magagna have accepted the clause if he had known that Mr. Barrett intended there to be no adjustments for pressure base or Btu?

The negotiations of the various contracts in 1970 spanned some six months. The negotiators focused on other issues. Reducing the originally proposed 5¢ premium to 3¢ was about the only objection that Mr. Magagna had to Article 6(b). He would have been surprised if he had understood that the 2¢ reduction is hardly worth two cents amidst the diverse implications of Mr. Barrett's "definitely indefinite" and "unique" clause. When a single clause, little bargained over, virtually destroys the other terms and provisions of the package which were deliberately bargained for, unfair surprise is evidenced. A peripheral clause cannot be permitted to defeat the heavily dickered terms of an agreement. *Zabriskie Chevrolet, Inc.* v. *Smith*, 240 A.2d 195 (N.J. 1968). If the drafting party raised expectations contrary to the writing, unfair surprise is manifest, and if the result is harsh and oppressive, the clause is conconscionable and will not be enforced. *State ex rel Lefkowitz* v. *ITM, Inc.*, 275 N.Y.S. 2d 303 (Sup. Ct. 1967). And no clause "[m]ore intimately touches upon the question of unconscionability than does the term regarding price." *Jones* v. *Star Credit Corp.*, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969).

These results do not depend on the nature of the parties involved. Unconscionable clauses cannot be transformed into conscionable ones by the supposed sophistication of the parties. The list of ten cases in the official comments to Section 2-302 dispels the notion that unconscionability is a remedy limited to bailing out illiterate or dull-witted consumers. All ten arise in commercial transactions and more than half involve dealings between merchants. "The parties are not notably old

or young, bright or stupid, drunk, needy or sick. None of the cases involves sailors, women, heirs or other presumptive incompetents. There is no flavor of fraud or duress in any individualistic sense." Leff, *Unconscionability and the Code - The Emperor's New Clause*, 115 U.Pa.L.R. 485, 502 (1967).

The president of a canning company who carelessly signed a deceptively arranged contract was relieved from its obligations because he had not appreciated that the document he executed was in fact a contract. The unfair surprise arose from the manner in which the document was folded, the type of printing and the arrangement of the contents. *International Transportation Association* v. *Atlantic Canning Co.*, 249 N.W. 240 (Iowa 1933). The "circuitry of language" itself can impart misleading expectations in the non-drafting party which give rise to unfair surprise when the actual effect of the clause is learned. *Otto Baedeker & Associates, Inc.* v. *Hamtramck State Bank*, 241 N.W. 249, 250 (Mich. 1932). The record in this case clearly establishes that the contrived language of Article 6(b) did in fact mislead Mr. Magagna:

> Q. Are you saying that you say that what should be read into there is that the gas has to be under like conditions and circumstances; is that right?
>
> A. In effect, we have argued here that the BTU should be based on Beaver Creek BTU. Mr. Barrett gets up and says, "No, that's not true." I say that it is based on the contract of similar vintage gas. He gets up and says, "No." So I mean that is where our differences are.

(Tr. 407).

By admitting of no comparability standard for Article 6(b), the producers have clearly reached too far. Comparability is essential in a favored nations provision:

> "[C]omparability clauses govern determination of whether a dollar and cents price, greater on its face, is actually higher when pertinent factors of the two transactions are compared. . . . [I]t is the actual comparative values which must determine the true relationship of

prices as being higher, equal or lower." *Pure Oil Co.* v. *Federal Power Comm'n*, 299 F.2d 370, 373 (7th Cir. 1962).

Similarly, the threat of a coextensive sale in interstate commerce gave rise to a presupposition that Article 6(b) would merely provide a 3¢ premium over what Beaver Creek gas could have fetched if it had been sold in interstate commerce at that time. Mr. Magagna's only possible competitors in any coextensive sale were interstate purchasers. (Tr. 403). To purchase the gas for Northern, he had only to pay Amoco a 3¢ premium over the interstate price. This principle is recognized in a case much like the one at bar. *Amoco Production Co.* v. *Western Slope Gas Co.*, 535 F.Supp. 1305 (D. Colo. 1982). It involves on the one hand an intrastate gas utility, Western Slope Gas Company and its negotiator, Mr. Valenta, and on the other a producer and seller of gas, Amoco Production Company and its negotiator, Arles H. Barrett. The court found:

> "I accept the testimony of Mr. Valenta and reject the testimony of Mr. Barrett . . . . Western Slope knew that all it had to do to make the purchase was to meet or perhaps better just a little bit the price Amoco could get for its gas sold to one of the interstate pipelines." *Id* at 1308.

The clause at issue in *Amoco* v. *Western Slope*, of course, is entirely different language from that involved here. But the principle is analogous:

> "I have not the slightest doubt that . . . the purpose . . . was to be sure that the intrastate sale by Amoco to Western Slope would be protected by any vintage sections of the then proposed law which applied to gas sold in interstate commerce. Although Mr. Barrett said that such was not the intention of Amoco, ... Mr. Barrett's claim . . . was less than convincing." *Id.* at 1307-08.

Beyond unfair surprise, one-sidedness is another test proffered in the official comments, and oppression, the third test, contributes a sense of harsh and burdensome conditions. The case cited in the text of the comments principally relied on the concept of oppressive one-sidedness. The court regarded the

sharp bargain which had been struck to be "carrying a good joke too far." *Campbell Soup Co.* v. *Wenz*, *supra*, at 83. The defendant, a farmer, had agreed to sell carrots to the Campbell Soup Company under a written contract at a price of $30 per ton. He sold them instead on the open market at $90 per ton and Campbell sued to enforce the contract. Every provision was one-sidedly weighted in favor of Campbell. The one deemed by the court to be the hardest excused Campbell from accepting carrots under certain circumstances but did not permit the farmer to sell his rejected carrots elsewhere unless Campbell permitted him to do so. The court refused to enforce the contract because "it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience." *Id.* at 83.

Combining unfair surprise and one-sidedness, Karl N. Llewellyn, chief reporter and draftsman of the Uniform Commercial Code, intended unconscionability to police against clauses which are "too far unbalanced to be regarded as a background reasonably presupposed." Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 Colum. L. Rev. 863, 871 (1941). Unconscionability looks for too much of something on one side of a scale.

Northern's transportation obligation is certainly one-sided. An agreement which gives rise to a loss on the resale of 40% of the goods back to the initial seller is so one-sided as to be a "cake sliced 99-1", to again use the words of Professor Llewellyn. 21 *American Law Instituted Proceedings*, 144 (1944). Mr. Barrett in this case wanted all of the cake:

> Q. Then you say at the time the contract was negotiated, and still now, it was your opinion and intention to contract for the highest possible price that anybody might receive for gas sold in interstate commerce regardless of its quality, its location, its Btu content, or any special value it might have or special prices it might have by virtue of applying FPC practices or the provisions of the Natural Gas Policy Act?

A. The Beaver Creek contract required payment on an Mcf basis, not on a Btu basis, so the answer to your question is yes.

(Tr. 219).

He wanted everything, without regard to anything. "There wasn't any doubt in my mind, Mr. Brown, but it would become the highest possible price being paid to any producer in the State of Wyoming." (Tr. 202).

Q. No matter what the basis was for permitting that highest price to be paid as compared to Beaver Creek gas?

A. True.

(Tr. 202).

Can this case be said to present anything except an oppressively one-sided bargain? The renegotiation of the contract in 1970 was nothing but a string of concessions on the part of Northern. (Finding 20). The take-or-pay obligation was increased so high that Northern had no capacity left to purchase cheaper gas from others which was in fact then available. (Tr. 513 and 514). And like the farmer who could not sell rejected carrots to someone else without the permission of Campbell Soup Company, the contract in this case prohibits Northern from dumping the high priced Beaver Creek gas in an interstate sale. (Exhibit A, Article 3). And like the seller of shucks who testified that he had made no mistake, that he had intended to bid 60¢ per pound and not per hundredweight, Mr. Barrett in this case testified that the so-called "price" to be adopted in Article 6(b) did not depend on whether it was based on one pressure base or another, and it did not depend on whether the third party's gas was rich in Btu or poor, except that he would "diligently search" for the richest Btu gas because it would lead to a higher Beaver Creek price. (Tr. 219). And the same holds true for tax reimbursement. (Tr. 217 through 219). And Mr. Barrett intended no less result concerning vintage, where he asks to be paid new gas prices for old gas, and where he asks to be paid the small producer bonus for

Amoco Production Company, one of the largest oil companies in the world.

III. PUBLIC POLICY

A. Wyoming Public Policy

The public policy of a state may be found in its "constitution and statutes and when they have not directly spoken, then in the decisions of the courts and in the regular practice of government officials." *Taylor* v. *State*, 612 P.2d 851, 865 (Wyo. 1980) (Rooney J. concurring). The regular practice of the Attorney General is to appear in cases in which the public interest is affected. Through that office, the State of Wyoming participated in this case as *amicus curie*. Wyoming joined with Northern in asking the district court to find Article 6(b) to be void. It joined in asking the court of appeals to affirm that action. That is the expressed public policy of the State of Wyoming in this particular case.

An authoritative history of indefinite price escalator clauses notes that "such clauses are themselves distinctly out of favor." 4 *Oil and Gas Law*, Williams, 1977, Section 726, Customary Provisions of Contract: Escalation Clauses. Section 726.1, page 763. "There is substantial evidence that in design and function" indefinite price escalator clauses "are 'incompatible with the public interest'." *Permian Basin Area Rate Cases*, 390 U.S. 747, 783 (1968). Clauses which are not favored at law are strictly limited unless they are shown to be reasonable under the particular facts and circumstances of the case. *Keller* v. *California Liquid Gas Corp.*, 363 F.Supp. 123, 126-127 (D. Wyo. 1973). Belonging to a class which is generally disfavored, Article 6(b) should not be enforced because there is nothing to save it in the particular facts and circumstances of record here. The "unique" clause in this case, which admits of no adjustment for proper measurement factors even, cannot be said to further public policy. Language which was deliberately crafted to be "definately indefinite" and at odds with the meaning instilled in the non-drafting party is not in the public interest. A clause which enables the seller to have 40% of the

goods transported and resold back to him at a loss to the buyer cannot be said to express public policy.

The public interest in this case, however, extends beyond the private pain suffered by Northern. Representing 85% of Northern's gas supply, the ten-fold increase in the price of Beaver Creek gas over a four-year period has translated into an unexpected hardship on consumers. "For the consumer a monthly gas bill of $30 has been increased to approximately $250 and is still increasing under clause 6(b) as claimed by the producers." (Finding 47). This increase stretches the price to several orders of magnitude above the fairly negotiated price schedule contained in Article 5, even after inflation adjustments permitted by Article 7. "Considering these circumstances, the contract is one that could result and did result in extreme hardship to the public." (Finding 45). "Contracts cannot be used as a 'device to hoodwink the law'." *TriCounty Electric Association, Inc.* v. *City of Gillette*, 584 P.2d 995, 1004 (Wyo. 1978).

The meaning of the public interest is disclosed in such cases as *Riddley* v. *Kraut*, 180 P.2d 124 (Wyo. 1947). The court in that case refused to enforce a written covenant not to compete in the business of repairing mechanical equipment. "Persons who are in need of such repair work ordinarily need or want it done promptly and it is in the public interest that their desires and needs to be fulfilled." *Id.* at 133. How much more in the public interest must be the sale of natural gas, a necessity of life for heating?

> "[I]t would seem that the character of service may be taken into consideration . . . . The sale and furnishing of lumber, for instance, stands on a different footing from the sale and furnishing of electricity under certain conditions. We may infer a public service in the one case when we would not in the other." *Rural Electric Co.* v. *State Board of Equalization*, 120 P.2d 741, 747, reh. den. 122 P.2d 189 (Wyo. 1942).

The court of appeals below discerned two reasons why Article 6(b) was compatible with the public interest of the State of Wyoming. The first was that the Wyoming legislature has not

enacted any restriction. And second, the court relied on a single decision by the Wyoming Supreme Court. Taking these matters in order, it will be seen that neither controls here.

When the legislature has not spoken, public policy may be adduced from "the decisions of the courts and in the regular practice of government officials." *Taylor* v. *Smith*, *supra* at 865. "Whether a contract is against public policy does not depend solely upon any local statute." *Fidelity & Deposit Co. of Maryland* v. *Grand National Bank of St. Louis*, 69 F.2d 177, 180 (8th Cir. 1934). The inherent powers of a court stand independent from enactments of a legislature. Public policy turns in large measure on the peculiar facts and circumstances of a particular case and is therefore a concept which is not conducive to codification. For five years, the Federal Power Commission asked Congress to proscribe indefinite price escalator clauses. Despite that Congress did not act after the proposal had been placed before it, the inherent power of the Commission was not diminished.

> "The fact that Congress was unwilling to set aside, by statutory fiat, existing price escalation clauses, has no tendency to establish that the Commission did not already have power to deal with the problem . . . ." *Superior Oil Co.* v. *Federal Power Comm'n*, 322 F.2d 601, 618 (9th Cir. 1963).

The other ground relied on by the court of appeals below is an opinion of the Wyoming Supreme Court. *Amoco Production Co.* v. *Stauffer Chemical Co.*, 612 P.2d 463 (Wyo. 1980). It held that the clause there presented did act to raise the contract price to that of the newest vintage of gas sold in interstate commerce. But that case is not determinative here. The *Amoco* v. *Stauffer* court itself offered that it might have reached a different result except that the parties had "specifically stipulated" that the newest vintage was "generally applicable", a precondition required by the clause. *Id.* at 466. The clause in that case is different from the one at bar in a number of other respects as well. The parties in *Amoco* v. *Stauffer* agreed that their clause was clear and unambiguous. *Id.* at 465. It included

adjustments for heating value (Btu) conversion, and it did not apply in the event of deregulation. *Id.* at 464. Furthermore, *Amoco* v. *Stauffer* dealt with a private contract between two Fortune 500 companies. This case concerns residential consumers for whom Beaver Creek gas is their only source of heat.

Amoco v. *Stauffer* is a contract interpretation case and not one involving public policy. Although, as the court of appeals below noted, a certain amount of argument pertaining to public policy may have been included in the briefs of the parties, public policy is not addressed in the *Amoco* v. *Stauffer* opinion. Deciding that an indefinite price escalator clause may act to escalate the contract price as a matter of contract interpretation does not foreclose the fact that it may nevertheless be unenforcible if it is contrary to public policy. *Superior Oil Co.* v. *Western Slope Gas Co.*, 604 F.2d 1281, 1295 (10th Cir. 1979) (J. Barrett concurring).

B. Federal Public Policy

The court of appeals below relied on the Natural Gas Policy Act of 1978. 15 U.S.C. § 3301 *et seq.* ("NGPA"). The court seems to interpret the NGPA as an endorsement of any kind of indefinite price escalator clause no matter how conceived.

That is not the case. Federal policy cannot be said to support a ten-fold price increase over a four-year period. The purpose of the NGPA is one of price controls, not unlimited price increases. "[T]he statute's operation is limited to keeping sales prices from exceeding the ceiling." *Pennzoil Co.* v. *Federal Energy Regulatory Comm'n*, 645 F.2d 360, 374 (5th Cir. 1981). Under Section 105(b)(1) of the NGPA, the section applicable to Beaver Creek gas, the ceiling price may be escalated to the "new" gas price only if the contract contains a "sufficient escalation mechanism." *Id.* at 375. Whether Article 6(b) is a sufficient escalation mechanism is the question presented in this case. Such a question must be determined under state contract law. *Id.* at 382. The NGPA does not reflect a policy of

pushing all prices to the limits of the ceiling. The conference committee stated:

> "The conferees do not intend that the mere establishment of the ceiling prices under this act shall trigger indefinite price escalator clauses in existing intrastate contracts." H.R. Conf. Rep. No. 95-1752, 95th Cong. 2d Sess, p. 83, *reprinted in* [1978] 7 U.S. Code Cong. Admin. News 8983, 9000.

The court of appeals misinterprets federal policy when it concludes that the NGPA expresses an endorsement of Article 6(b). Rather, the effectiveness of indefinite price escalator clauses must be determined on a case by case basis, as particular facts may present themselves, and even identical language may lead to different results. *Pennzoil*, *supra* at 386. It is the facts of the case at bar which the court of appeals overlooked and did not consider. Facts which disclose an unconscionable clause contrary to the public interest.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari be issued in this case.

Respectfully submitted,

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